STATE OF MICHIGAN

COURT OF APPEALS

COMMERCE PLACE, LLC, Plaintiff-Appellant,	UNPUBLISHED October 18, 2005
v	No. 262747 Oakland Circuit Court
JENNA B CORPORATION and ROBERT GUNTMACHER, Defendants-Appellees.	LC No. 05-063857-CK

Before: Talbot, P.J., and White and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition and dismissing the case. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On November 14, 2002, plaintiff and Jenna B Corporation (JBC) entered into a commercial lease agreement pursuant to which JBC agreed to lease certain real property from plaintiff for a term of five years, commencing on March 1, 2003. Robert Guntmacher, the president of JBC, executed a personal guaranty for the lease. By its terms, the guaranty was to expire on February 28, 2005.

By letter dated November 16, 2004, Guntmacher informed plaintiff that JBC had "effectively ceased to operate" and that JBC tentatively planned to vacate the premises at the end of February 2005, but that Guntmacher would consider personally remaining on the premises if the parties could reach an "equitable compromise." Plaintiff informed Guntmacher that JBC had anticipatorily breached the contract and demanded that he pay the sum of $45,500, representing the remaining unpaid rent due under the lease. JBC continued to pay rent and perform its obligations under the lease.

Plaintiff filed suit alleging that JBC's stated intention not to perform its obligations under the lease constituted an anticipatory breach of contract, seeking all amounts due under the lease as damages. Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that JBC had not anticipatorily breached the lease because it had not expressed an unequivocal intent not to perform its obligations under the lease and had continued to perform those obligations. The trial court agreed and granted defendants' motion.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

Under the doctrine of anticipatory breach, if, prior to the time of performance, a party to a contract unequivocally declares an intent not to perform, the innocent party has the option to either sue immediately for breach of the contract or wait until performance is due under the contract. *Stoddard v Manufacturers National Bank*, 234 Mich App 140, 163; 593 NW2d 630 (1999). A party's intention, as manifested by acts and words, controls whether an anticipatory breach has occurred. A party's acts must be voluntary and affirmative, and must make it actually or apparently impossible for the party to perform under the contract. A party's words must be capable of being reasonably interpreted to mean that the party cannot or will not perform under the contract. *Paul v Bogle*, 193 Mich App 479, 493-494; 484 NW2d 728 (1992).

A guaranty is a unilateral contract. The doctrine of anticipatory breach, which applies only to bilateral contracts, cannot serve as the basis for an assertion of liability against a guarantor. See *Brauer v Hobbs*, 151 Mich App 769, 776; 391 NW2d 482 (1986).

We affirm. In his letter of November 16, 2004, Guntmacher stated that JBC planned to vacate the premises at the end of February 2005, but that Guntmacher would be willing to personally remain as a tenant on a month-to-month basis or would even consider remaining "indefinitely" if the parties could reach an "equitable compromise." The letter characterized Guntmacher's plans for JBC as "tentative," and stated neither that JBC would refuse, under any circumstances, to perform under the contract after February 2005, nor that JBC would be unable to perform under the contract after that date. JBC did not declare, by words or acts, an unequivocal intent to not perform under the contract. *Stoddard, supra*. Guntmacher indicated that JBC had "effectively ceased to operate;" however, he did not assert that performance was impossible under the contract after February 2005. *Bogle, supra*. The trial court correctly found that Guntmacher's letter did not contain the required language to constitute an anticipatory breach of the lease agreement by JBC. *Id*. Plaintiff was not entitled to damages under a theory of anticipatory breach. *Stoddard, supra*. No basis existed for holding Guntmacher liable as guarantor. *Brauer, supra*.

The trial court concluded that no anticipatory breach occurred and, thus, did not address plaintiff's argument that it was entitled to collect all amounts due under the lease, notwithstanding the fact that the lease did not contain an acceleration clause. Plaintiff raises this issue on appeal; however, we need not consider it. Our review is limited to issues actually decided by the trial court. *Preston v Dep't of Treasury*, 190 Mich App 491, 498; 476 NW2d 455 (1991).

Affirmed.

/s/ Michael J. Talbot
/s/ Helene N. White
/s/ Kurtis T. Wilder